82-1196

No. _____

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

GERTRUDE BARNSTONE and HARVEY MALYN,

Petitioners

V.

UNIVERSITY OF HOUSTON, KUHT-TV,
and
PATRICK J. NICHOLSON,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUT

DAVID H. BERG
PHILIP D. ZELIKOW
3702 Travis
Houston, Texas 77002
(713) 529-5622

COUNSEL FOR PETITIONERS

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QUESTIONS PRESENTED

I. Whether the government official in charge of a state operated public television station may cancel a previously scheduled program for the express reason that the program's substantive content conflicts with the government official's own political views?

II. If a state operated television station enjoys unqualified editorial discretion, can the administering government official, acting on his political views, overrule the editorial decision of those state employees actually entrusted with editorial duties?

LIST OF PARTIES

Gertrude Barnstone and Harvey Malyn,

Petitioners

University of Houston, KUHT-TV,
and
Patrick J. Nicholson,

Respondents

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Miscellaneous

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The petitioners Gertrude Barnstone and Harvey Malyn respectfully pray that a writ of certiorari issue to review the judgment and opinions of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on October 15, 1982.

OPINIONS BELOW

The en banc opinions[1] of the Court of Appeals are reported at 688 F.2d 1033 (5th Cir. 1982). The previous panel opinion of the Court of Appeals is reported at 660 F.2d 137 (5th Cir. 1981). The opinion of the United States District Court for the Southern District of Texas is reported at 514 F.Supp. 670 (S.D. Tex. 1980). All of these opinions appear in the Appendix hereto.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was entered on October 15, 1982 and this petition for certiorari was filed within 90 days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

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[1]No opinion of the Court below was joined by a majority of the judges. Out of twenty-two judges sitting in the case, eleven joined in the plurality opinion, four concurred in the result only, and seven judges dissented.

STATEMENT OF THE CASE

In pertinent part, the findings of fact by the District Court, none of which were challenged on appeal, were as follows:

"The University of Houston is a co-educational institution of higher learning operating under the authority of Texas law. See Tex. Educ. Code. Ann. §§ 111.01 et seq. (Vernon). The control of the University is vested in a Board of Regents, id. at § 111.11, whose members are appointed by the Governor with the advice and consent of the Senate. Id. at § 111.12. Approximately 50 percent of the University's operating budget comes directly from the State of Texas' general revenue funds.

"One of the activities conducted by the University of Houston is the operation of KUHT-TV, a noncommercial educational television station licensed to it by the Federal Communications Commission under the Communications Act of 1934, 47 U. S. C.

§§ 151 et seq., as amended. KUHT-TV obtains its power from the University of Houston and is housed in a building maintained by the University of Houston and located on the campus. Approximately 60 percent of KUHT-TV's annual budget of $2.7 million dollars in the coming year consists of public funds from the Association for Community Television (ACT). About 12 percent of its budget is derived from state funds obtained from the Gulf Regional Educational Television Affiliate (GRETA) for the broadcasting services provided to local school districts during the school year. The remainder of its funds come from federal community service grants. [...]

"Sometime prior to May, 1980, PBS sent a SPC [Station Program Cooperative] catalogue to KUHT-TV. After reviewing the catalogue, KUHT-TV, by affirmative vote, like 144 other public television licensees, agreed to share in the costs of obtaining

the rights to televise a thirteen-program series entitled "World". [citation omitted] The series was obtained and distributed by PBS and aired regularly by KUHT-TV. One of the programs in the series, produced jointly by WGBH Educational Foundation, licensee of noncommercial educational television station WGBH-TV in Boston, Massachusetts, and ATV Network of London, England, was entitled "Death of a Princess." [citation omitted] A documentary recreation of the events surrounding the execution of a Saudi Arabian princess and her lover by the Saudi Arabian government, "Death of a Princess" was scheduled for distribution by PBS on Monday, May 12, 1980, at 8:00 p.m. KUHT-TV announced in its monthly program schedule, "The Public Times", (Plaintiff' Exhibit 4) that it would televise the program at that time. During the second week in April, 1980, however, PBS alerted KUHT-TV and its other member stations, pursuant

to its previously established policy, to the fact that "Death of a Princess" contained what it referred to as "controversial material."

The President of the University of Houston, Dr. Charles E. Bishop, and the Board of Regents of the University had delegated full responsibility for the operation of KUHT-TV, as well as KUHT radio, to Dr. Patrick J. Nicholson, the Vice President for Public Information and University Relations and a defendant in this case. [footnote omitted] Dr. Nicholson, in turn, had delegated full responsibility for programming at KUHT-TV to Mr. James Bauer, KUHT-TV's General Manager, and Ms. Virginia Mampre, KUHT-TV's Director of Programming. See Plaintiffs' Exhibits 8, 9.

"In his seventeen (17) years of supervising the operation of KUHT-TV, Dr. Nicholson had never, he testified, decided

what was or was not to be shown by the station. Notwithstanding that fact, when KUHT-TV was notified by PBS that "Death of a Princess" contained "controversial material", Dr. Nicholson stepped in. He reviewed the program, at Mr. Bauer's suggestion, twice before May 1, 1980, and briefly discussed the show with both Mr. Bauer and Ms. Mampre. On May 1, 1980, Dr. Nicholson -- acting on his own authority and notifying neither Mr. Bauer nor Ms. Mampre of his decision -- issued a press release stating that KUHT-TV would not carry "Death of a Princess". The press release, in its entirety, read as follows:

> FOR IMMEDIATE RELEASE, NOON, CDST May 1, 1980
>
> KUHT, the nation's pioneer public television station licensed to the University of Houston, will not carry "Death of a Princess," it was announced today. The Public Broadcasting Service (PBS) documentary recreation, scheduled for broadcast May 12, has become the

center of a rising storm of controversy since it was shown in England as a joint production of ATF England and WGBH, Boston. Saudi Arabia ordered the British ambassador to return to London after the telecast.

Patrick J. Nicholson, University of Houston System vice president who has administered KUHT since 1965, issued a prepared statement regarding cancellation of the program. The statement emphasized that the decision not to broadcast it was one of the extremely rare instances in which KUHT, first of the now 287 public television stations to go on the air, had cancelled PBS programming, but an action clearly indicated on balance.

Dr. Nicholson cited as a central issue "strong and understandable objections by the government of Saudi Arabia at a time when the mounting crisis in the Middle East, our long friendship with the Saudi government and U.S. national interests all point to the need to avoid exacerbating the situation."

He said that in KUHT's view, "The Death of a Princess" specifically charges wide-

> spread moral laxity at high levels of Saudi Arabian society, and questions the organization and policies of the Saudi government, through recreated interviews and narrative. These allegations are not balanced in a responsible manner, Dr. Nicholson added.

"Neither Ms. Mampre nor Mr. Bauer agreed with Dr. Nicholson's decision to cancel the program. Ms. Mampre, informed of Dr. Nicholson's decision after his statement had been released, told both Dr. Nicholson and Mr. Bauer that she disagreed with the decision. In a memorandum to Mr. Bauer, dated May 5, 1980, (Plaintiffs' Exhibit 6), Ms. Mampre wrote that she had scheduled the two hour special to air since the program was an example of the type of informational and public affairs programming called for by KUHT's charter. She noted that based on information received from PBS and WGBH all of the events portrayed in the film had at least two

sources. Dr. Nicholson's decision not to air was made too early, Ms. Mampre concluded, in light of the fact that there were still two weeks left to analyze the international scene before making the final decision.

"Mr. Bauer originally shared Dr. Nicholson's concerns that "Death of a Princess" lacked balance and perspective. His view of matters altered, however, when he learned that the program would be "balanced" by the broadcast of a follow-up show featuring a panel discussion of "Death of a Princess" which included participation by local viewers. By May 12, 1980, Mr. Bauer testified, he was convinced that "Death of a Princess" should be shown. Neither Ms. Mampre nor Mr. Bauer, however, had the authority to overrule Dr. Nicholson.

"In response to an inquiry by Dr. Bishop at the meeting of the Broadcasting,

Development & Public Affairs Committee of the Board of Regents on May 5, 1980, Dr. Nicholson explained the decision to cancel "Death of a Princess." See Plaintiffs' Exhibits 2, 5. Dr. Nicholson implied to the Committee that both Ms. Mampre and Mr. Bauer shares his view of the program. See Plaintiffs' Exhibit 5. In addition, in a conversation with Dr. J. Dans Armistead, Chairman of the Committee and a member of the Board of Regents, Dr. Nicholson emphasized that the final decision fell on him rather than the Board. In this respect, said Dr. Nicholson, he was acting as a "heat shield" for the President and the Board. Id.

"Dr. Bishop, President of the University, testified that he felt that it would have been improper to overrule Dr. Nicholson's decision. Dr. Nicholson, Dr. Bishop noted, had been delegated the responsibility to run KUHT-TV. He was not aware that

Dr. Nicholson had delegated the responsibility for programming decisions to Ms. Mampre and Mr. Bauer. See Plaintiffs' Exhibits 8, 9. Nor was he aware that Dr. Nicholson had never before made a programming decision at KUHT-TV.

"In addition to the reasons cited in his May 1, 1980 press release, the Court, upon consideration of Dr. Nicholson's testimony, finds that there are four other reasons why he may have decided to cancel the program. First, Dr. Nicholson said that he considered the program to be "in bad taste." The scenes in which the royal princesses arranged "assignations" with attractive young men were, Dr. Nicholson felt, particularly offensive. Second, Dr. Nicholson explained that he was concerned that some members of the public might believe that this "docu-drama" was a true documentary. Third, Dr. Nicholson testified that the University of Houston had

previously entered into a lucrative contract with the Saudi Arabian royal family to instruct a particular princess as part of its "Open University" program. Under that contract the University of Houston had sent a professor to Saudi Arabia to serve as the princess' tutor and to hand-tailor a curriculum to suit her needs. Dr. Nicholson stated that he believed the princess educated pursuant to the contract and the princess whose death was the subject of "Death of a Princess" were "distant cousins."

"Finally, Dr. Nicholson testified that he had been in charge of all fundraising activities for the University of Houston from 1957 through 1978. Although a 1978 reorganization removed Dr. Nicholson from involvement with day-to-day fundraising, he was still responsible for soliciting large individual donations. The University of Houston, he testified, receives a signifi-

cant percentage of its contributions from individuals in oil-related companies. According to Dr. Nicholson, 15 to 20 percent of the University of Houston's private contributions come directly from major oil companies. That percentage, it should be noted, does not include contributions from individuals who own shares in, have contracts with, or are employed by companies doing business in oil.

"Upon learning of Dr. Nicholson's decision, May 8 1980, plaintiff Barnstone initiated this suit to require KUHT-TV to air "Death of a Princess." Ms. Barnstone is a subscriber to and regular viewer of KUHT-TV. Although "Death of a Princess" has not been publicly broadcast in Houston, after this Court's order granting her motion for a temporary restraining order was vacated Ms. Barnstone did manage to attend two private screenings of the program. She has not seen, however, the follow-up

program broadcast on the public television stations that carried the program. She maintains quite insistently, furthermore, that she still wishes to see "Death of a Princess," along with the follow-up program, broadcast on KUHT-TV. Plaintiff Harvey Malyn is also a viewer of KUHT-TV who desires to see "Death of a Princess" aired on that station. Mr. Malyn, unlike Ms. Barnstone, has never seen "Death of a Princess," with or without its follow-up program."

Suit was filed on May 8, 1980. Jurisdiction of the District Court was invoked under the First Amendment and 42 U.S.C. § 1983. After a hearing, the District Court granted a temporary restraining order requiring that the program be shown on schedule. 487 F.Supp. 1347 (S.D. Tex. 1980). The Court of Appeals vacated this order, on condition that respondents "tape and preserve the program in issue...."

This Court upheld that ruling, expressing no opinion on the merits and reiterating the same condition. 446 U.S. 1318 (1980) (per Powell, Circuit Justice).

After a full trial on the merits the District Court entered a judgment in favor of petitioners. 514 F.Supp. 670 (S.D. Tex. 1980). The District Court's order was stayed pending appeal. After oral argument in this case another panel of the Court of Appeals held, in a divided vote, for the defendants in Muir v. Alabama Educational Television Commission, 656 F.2d 1012 (5th Cir. 1981), another case arising from the 'Death of a Princess' controversy but with a different factual setting. The panel in this case found that the decision in Muir required them to reverse the judgment of the District Court. 660 F.2d 137 (5th Cir. 1981). Upon a poll requested by a judge on the Court of Appeals, the Court of Appeals vacated the panel opinions in Muir and in

this case and directed that both cases be consolidated and reheard by the en banc court. Although there was no majority opinion, a majority of the judges on the en banc court agreed to affirm Muir and reverse the District Court in this case. 688 F.2d 1033 (5th Cir. 1982). All opinions in all the lower courts addressed the merits of the constitutional questions presented here.

REASONS FOR GRANTING THE WRIT

I. THE CONSTITUTIONAL VALUES AT STAKE IN THIS CASE ARE AT THE HEART OF THE PROTECTIONS GUARANTEED BY THE FIRST AMENDMENT.

The programmers of television station KUHT-TV scheduled for broadcast a controversial program which offered a critical view of actions of the government of Saudi Arabia. The government official supervising the station's activities was, by his own account, hostile to such criticism and sympathetic to Saudi Arabian objections to

the program. This official's hostility to the program's views and potential communicative impact caused him to act to suppress those views. As a result of his actions, taken in his governmental capacity and with open acknowledgment of his political considerations, the program - and its ideas - was successfully suppressed. The program has never been shown on a Houston television station and it has never been shown in any forum in Houston that is accessible to the public.[2]

From the time of its inception, the

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[2]The plurality opinion of the Court of Appeals pointed out that one of the plaintiffs, Ms. Barnstone, viewed the program (without its balancing trailer) at Rice University and thereupon concluded the District Court erred in holding that respondents suppressed the film. 688 F.2d at 1047 and 1047 n. 33. The plurality opinion reached this conclusion although this fact finding by the District Court had never been challenged by respondents. One reason why respondents did not challenge the fact finding, and the reason why the plurality's assumption is incorrect, is that Ms. Barnstone was invited to a special showing of a 'bootleg' copy of the film, a showing that was open only to members of the local press that were covering the case in the Houston media. The film has to this date never been shown in a forum accessible either to the general public in Houston or to petitioner Malyn.

most fundamental guarantee of the First Amendment has been its protection of ideas from suppression or prior restraints by the government. See Emerson, Colonial Intentions and Current Realities of the First Amendment, 125 U. Pa. L. Rev. 737, (1977); cf. Lovell v. City of Griffin, 303 U.S. 444, 451 (1938) ("The struggle for the freedom of the press was primarily directed against the power of the licensor.") Involvement of the government in this decision was complete. Dr. Nicholson was vice president of a state university and his decision was approved by the Board of Regents, direct appointees of the Governor of Texas, at a meeting where Dr. Nicholson explained that by assuming responsibility he was acting as a "heat shield" for the Regents and the University President. 514 F. Supp. at 675. Poliltical motivation for this decision, which overruled the station's programmers, was explicit. Dr.

Nicholson feared that the program might "exacerbate the situation in the Middle East" and, although he was "entirely unable ... to explain what he meant by this phrase ...," 514 F. Supp. at 691, he described the "central issue" as being "objections by the government of Saudi Arabia," a sympathy which the District Court found was associated, at least in part, with Dr. Nicholson's involvement in major fundraising from oil companies. 514 F. Supp. at 675. Both in motive and in process this is a classic case of governmental suppression of disagreeable ideas. Because KUHT-TV is the only PBS station in the Houston area the suppression has been realized in practice.

Even if editorial discretion is considered to be a balancing First Amendment value, the result of the decision is that absolute editorial discretion is upheld in a case where the governmental official actually overruled the judgment of the real

editors. See 514 F. Supp. at 673-75. Historically courts have repeatedly intervened to protect the discretion of student editors from the unreasonable intervention of supervisory state officials. See, e.g., Bazaar v. Fortune, 476 F.2d 570 (5th Cir.), aff'd as modified en banc, 489 F.2d 225 (1973), cert. denied, 416 U.S. 995 (1974); Shanley v. Northeast Independent School Dist., 462 F.2d 960 (5th Cir. 1972); Channing Club v. Board of Regents, 317 F. Supp. 688 (N.D. Tex. 1970); Dickey v. Alabama State Board of Education, 273 F. Supp. 613 (M.D. Ala. 1967), vacated as moot sub. nom., Troy State University v. Dickey, 402 F.2d 515 (5th Cir. 1968); see also Zucker v. Panitz, 299 F.Supp. 102 (S.D.N.Y. 1969); Wright, The Constitution on the Campus, 22 Vand. L. Rev. 1027 (1969). The value being protected in these cases is the right of an editor to determine the content of his newspaper free from unconstitutionally

motivated interference. That was the same value preserved by the District Court in this case. To transfer the protection to the intervening state official and then say that the official was exercising his editorial right by overruling his editors would destroy the substance of the constitutional right in order to preserve its form.

The implications of the decision of the Court of Appeals go far beyond even the egregious facts of this particular case. The discretion afforded to state officials operating television stations does not, under this decision, have any discernible constitutional limits. If state officials can openly curtail access to their major media outlet, often the only public television in a community, based on their openly avowed political preferences what, then, is the stopping point?

The plurality opinion cites Community

Service Broadcasting v. F.C.C., 593 F.2d 1102, 1110 n.17 (D.C. Cir. 1978) for the principle that government may participate in the marketplace of ideas. 688 F.2d at 1038. The plurality did not read further to where, in the same opinion, the court warned:

> Government financial support of noncommercial broadcasting itself carries with it dangers of an inhibiting effect on programming... While some such inhibition may be inevitable in any scheme of government funding, the risk to First Amendment values must be minimized if the scheme is to pass constitutional muster.

593 F.2d at 1114-15 (D.C. Cir. 1978). The risk to First Amendment values is now realized in this case, where a state institution has directly interposed the political views of its officials between the public broadcasting station and the viewer. The significance of this question justifies the grant of certiorari to review the judgment below

II. THE DECISION BELOW RAISES SIGNIFICANT AND RECURRING PROBLEMS IN CONSTITUTIONAL INTERPRETATION AND IT IS IN CONFLICT WITH APPLICABLE DECISIONS OF THE SUPREME COURT.

A. Governmental Censorship Is Not A Legitimate Means for Expression of Governmental Views

The plurality and concurring opinions of the Court of Appeals concede that the government officials involved in the case did not enjoy any constitutionally protected editorial discretion. Yet these opinions argue instead that in this case government was exercising an unprotected right to participate in the marketplace of ideas and contribute its views. 688 F.2d at 1038; 688 F.2d at 1050 (Rubin, J., concurring). This position has several basic flaws.

First, this case does not involve a station dedicated to dissemination of the government's political views. The government could undoubtedly set up such a

station, appropriately labeled. But, like the municipal auditorium of Chattanooga in Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975), this station was soliciting public money to further broader goals. At the trial Virginia Mampre, Program Director for KUHT-TV, indicated that KUHT-TV broadcasts a wide variety of programs aimed at communication and expression for the general community. She testified specifically that: "part of our programming policy is to bring before the public informational, cultural, public affairs, educational, and instructional, and general audience programming." Transcript of proceedings, Volume II, at 150. This testimony was undisputed.

Second, having set up a forum for the benefit of the community, the government could only control it for that purpose. We completely agree that the government could then have discretion to select programming

on criteria such as quality, viewer interest, balancing the mix of programs, competing programs for the same time slot, and many other factors consistent with community service. But none of these factors were present in this case. "[O]nce a forum is opened for the expression of views, regardless of how unusual the forum, neither the government nor any private censor may pick and choose between those views which may or may not be expressed." Bonner-Lyons v. School Committee, 480 F.2d 442, 444 (1st Cir. 1973) (public school information distribution system).

For example, University officials have some discretion as to which speakers they will allow on their campus. The state need not pay for off-campus speakers but, if they do pay for them, the law is clear that the officials cannot discriminate among the speakers on political grounds. Brooks v. Auburn University, 412 F.2d 1171, 1172 (5th

Cir. 1969) and the language of the district court in Brooks at 296 F.Supp. 188, 198 (M. D. Ala. 1969); see Molpus v. Fortune, 432 F.2d 916 (5th Cir. 1970); Stacy v. Williams, 306 F.Supp. 963 (N.D. Miss. 1969); see also Pickings v. Bruce, 430 F.2d 895 (8th Cir. 1970); American Civil Liberties Union v. Radford, 315 F.Supp. 893 (W.D. Va. 1970).

Third, in the broadcasting area the government's rights to propagate its views are outweighed by the rights of the viewers.

> It is the right of the viewers and listeners, not the right of the broadcasters which is paramount. It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail ... It is the right of the public to receive suitable access to social, political, esthetic, moral, and other ideas and experience which is crucial here.

CBS, Inc. v. F.C.C., 453 U.S. 367, 395

(1981), quoting Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 390 (1969) (emphasis added by this Court). Petitioners do not argue, however, that the viewers have a right to compel broadcasts to suit their taste; they only have a right to receive nonpolitical program selection by the state. Compelling broadcast of this program may be the remedy for political intervention, but it is not a right.

The plurality opinion of the Court of Appeals relied on Columbia Broadcasting System v. Democratic National Committee, 412 U.S. 94 (1973) as consistent with a rejection of a public right of access to the television station, 688 F.2d at 1042-43, although petitioners have never claimed such a right. In fact, Chief Justice Burger, in that portion of the Court's opinion joined by Justices Stewart and Rehnquist, made it clear that:

> Journalistic discretion would in many ways be lost to the rigid limitations that the First Amendment imposes on government. ...The concept of journalistic independence could not co-exist with a reading of the challenged conduct of the licensee as governmental action.

412 U.S. at 121.

The Justices explained the result in CBS by noting the difference in the way the case might have been resolved if the broadcaster had been an agent of the state. For example, Justice Douglas pointed out that:

> If these cases involved the Corporation (for Public Broadcasting - a federally funded agency), we would have a situation comparable to that in which the United States owns and operates a prestigious newspaper ... The Government as owner and manager would not, as I see it, be free to pick and choose such news items as it desired. For by the First Amendment it may not censor or enact or enforce any other "law" abridging freedom of the press. Politics, ideological slants, rightist or leftist tendencies could play no part in its design of programs...

CBS, 412 U.S. at 149 (Douglas, J., concurring). This view was also shared by Justice Stewart: "Were the Government really operating the electronic press, it would, as my Brother Douglas points out, be prevented by the First Amendment from selection of broadcast content and the exercise of editorial judgment." 412 U.S. at 143 (Stewart, J., concurring) (emphasis in original). Justice Stewart added: "The constitutional and statutory issues in these cases are thus quite different." Id.

B. Petitioners Have Suggested Workable Alternative Interpretations

1. The censorship position.

In his concurring opinion in the panel decision of this case, Judge Reavley argued that the public forum position as discussed in Muir was not essential "because I do not think the plaintiffs' primary claim is that they have a right to put anything they demand on the air. Rather, they are complaining that a particular program, already

scheduled to be shown and already paid for with the public's money, was cancelled by state officials because they did not like its political content." 660 F.2d at 139-40. This characterization is accurate.

Without reference to public forum doctrine, courts have agreed that the state may not restrict speech to silence its political message. Although the Court found no public forum in the Greenburgh mailboxes, Justice Rehnquist quickly added that: "To be sure, if a governmental regulation is based on the content of the speech or the message, that action must be scrutinized more carefully to ensure that communication has not been prohibited 'merely because public officials disapprove the speakers' view.'" United States Postal Service v. Council of Greenburgh Civic Association, 453 U.S. 114, 132 (1981); see also 453 U.S. at 131 n. 7.

In the school library context this

Court has also indicated that there may be checks on the discretion of government officials to restrict access to ideas in their institutions. Board of Education v. Pico, 102 S.Ct. 2799, 2806, 2809, 2810 (1982) (plurality opinion). The plurality in this case dealt with Pico only by concluding that, due to the division of the Court, they were "unable to interpret the Court's opinion in Pico to give us guidance ..." 688 F.2d at 1045 n.30. Yet that case persuasively argues, at least, that "our precedents command the conclusion that the State may not act to deny access to an idea simply because state officials disapprove of that idea for partisan or political reasons." Pico, 102 S.Ct. at 2814 (Blackmun, J., concurring). In addition, this case is much stronger than Pico; it lacks the parens patriae position of school officials controlling reading material for children. "I find allegations of censorship in the

context of state operated television broadcasting entitled to much greater scrutiny than similar allegations involving school board regulation of students' reading material." 688 F.2d at 1058 (F. Johnson, J., dissenting).

Time after time, this Court has reiterated that in television, as elsewhere, the government may play a role in regulating content only because "that role must be carefully neutral as to which speakers or viewpoints are to prevail in the marketplace of ideas." CBS, Inc. v. F.C.C., 629 F.2d 1, 30 (D.C. Cir. 1980), aff'd, 453 U.S. 367 (1981) (Tamm, J., concurring).

> Indeed, if it is the speaker's opinion that gives offense, that consequence is a reason for according it constitutional protection. For it is a central tenet of the First Amendment that the government must remain neutral in the marketplace of ideas. If there were any reason to believe that the Commission's characterization of the Carlin monologue

> as offensive could be traced to its political content... First Amendment protection might be required.

F.C.C. v. Pacifica Foundation, 438 U.S. 726, 745-46 (1978) (plurality portion of opinion of Stevens, J.,); see also Red Lion Broadcasting Co. v. F.C.C., 395 U.S. 367, 396 (1969) (warns of "official government view dominating public broadcasting"); National Broadcasting Co. v. United States, 319 U.S. 190, 226 (1943).

2. The public forum position.

The District Court in this case held that KUHT-TV was a public forum because it was operated by the government for public communication of views on issues of political and social signficance. See Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546 (1975); Southeastern Promotions, Ltd. v. City of West Palm Beach, 457 F.2d 1016,

1019, (5th Cir. 1972).[3] In this case respondents argued against this public forum position by insisting that this would create a right of viewer access; a position accepted by the plurality in the Court of Appeals. This characterization of our position is false.

From the outset of this case, petitioners have reiterated that they do not request any right of viewer access. Mindful that "each medium of expression...must

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[3]This definition remains unaffected by United States Postal Service v. Council of Greenburgh Civic Association, 453 U.S. 114 (1981). In that case the civic association had no right to use the mailboxes because mailboxes are authorized by Congress to be exclusive depositories of United States mail and so mailboxes are not public forums. Even if mailboxes were suitable forums for communication by everyone, the Court wrote, converting them to this use would destroy their original and necessary function since "the appellees' First Amendment activities were wholly incompatible with the maintenance of a nationwide system for the safe and efficient delivery of mail." 453 U.S. at 130 n.6. In contrast, showing "Death of a Princess" is obviously compatible with KUHT-TV's function since the station had already decided to show it before Dr. Nicholson intervened. Plaintiffs-Appellees are not asking that the station be used for any purpose it does not already serve. Also, it is noteworthy that the Court rested its decision on the content neutral nature of the regulation. The Postal Service had "by no means declined to distribute the leaflets which appellees seek to have deposited in mailboxes, but had simply insisted that the appellees pay the same postage that any other circular in its class would have to bear." 101 S.Ct. 453 U.S. at 127 n.5.

be accessed for First Amendment purposes by standards suited to it, for each may present its own problems....," Southeastern Promotions, Ltd. v. Conrad, 420 U.S. at 557, our position has been that, as a public forum, KUHT-TV would only be prohibited from making restrictions motivated by hostility to the communicative impact of the speech and stemming from a specific viewpoint of the broadcaster. This parallels the first track of abridgement suggested by Professor Tribe. See L. Tribe, American Constitutional Law 580 (1978). This view is also consistent with the views of other commentators on this specific problem. Karst, Public Enterprise and the Public Forum, 37 Ohio S.L.J. 247, 257-59 (1976); Comment, Access to State-Owned Communications Media - The Public Forum Position, 28 U.C.L.A. L. Rev. 1410, 1457 (1979).

The merit of this view, a theoretical alternative to the censorship position out-

lined above, is that it avoids an all-or-nothing choice and addresses Justice Rehnquist's desire, in his Conrad dissent, to accord "some constitutional recognition" to "that element of [a city theater] which is 'theater' ... along with that element of it which is 'municipal.'" Conrad, 420 U.S. at 573-74 (Rehnquist, J., dissenting). Competing applications for use of the forum are permissible grounds for government decisions, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. at 555, and a state official choosing among programs available for a given time slot can consider the quality of the program's production, viewer interest in the program, the desire to effect a balanced mix of programs, and many other factors. But, as a state official controlling a state media outlet, his politically motivated hostility to the program's message is not a constitutionally acceptable ground for a program cancellation. The fo-

cus, as in an employment discrimination case, is on the illegal motives of the decision-maker, unrelated to any preexisting 'right of access.'

3. The proposed standard of review.

Under both the public forum and the government censorship positions, if the government motive stems from hostility to the political content of the speech then the restriction is presumptively unconstitutional. Since the inquiry goes to motive we have agreed with the dissenters in the Court of Appeals that the Supreme Court has promulgated a useful evidentiary standard for this case in Mt. Healthy City School Dist. v. Doyle, 429 U.S. 274 (1977).

In Mt. Healthy a teacher claimed he was discharged as a punishment for exercising his First Amendment rights. The circumstances left some doubt as to whether protected conduct alone caused his dismissal. 429 U.S. at 281-82. The Supreme

Court held that the school board should not have to explain all of its employment decisions, so the initial burden should be on the plaintiff to show that unconstitutional motivations were a "substantial" or "motivating" factor in the decision. 429 U.S. at 285-87. Once this burden is met by the plaintiff, however, the duty shifts to the defendant to show that the decision would have been the same if the improper factor had not been considered. 429 U.S. at 287.

Applied to the present case, this test would not impair programming discretion while it would afford a remedy in the rare case where the state can be shown to have exceeded constitutional limits. The standard was developed in an area where every decision could arguably create constitutional claims. This would be a workable standard that is consistent with principles of judicial conservatism and avoidance of undue intrusion. The rule is similar to

that proposed by Justice Harlan for scrutiny of First Amendment claims arising from school disciplinary decisions, another fertile area of potential constitutional claims. See Tinker v. Des Moines Independent Community School Dist., 393 U.S. 503, 526 (1969) (Harlan, J., dissenting). The only person with specialized training and experience in programming to testify at the trial was Virginia Mampre, Program Director for KUHT-TV. She summarized the matter very well in the final portion of her testimony:

> A. We certainly evaluate a program based on its newsworthiness and content to the community.
>
> Q. [by Mr. Zelikow] Do you ever evaluate a program based on your own personal political view of the program contrasted to the newsworthiness?
>
> A. No. I'm a professional.

Transcript of Proceedings, vol. II., at 174.

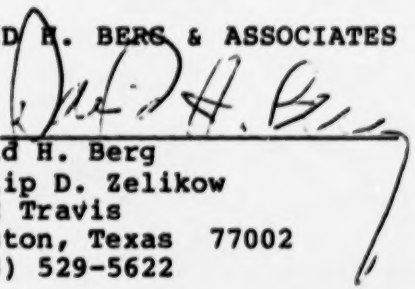
As explained earlier, the constitutional interpretation of the Court of Appeals is neither definable nor workable. Given the potential future of public television and government involvement in broadcasting, this Court should confront the constitutional problems and choose a durable response consistent with our fundamental values.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment of the Court of Appeals for the Fifth Circuit.

Respectfully submitted,

DAVID H. BERG & ASSOCIATES

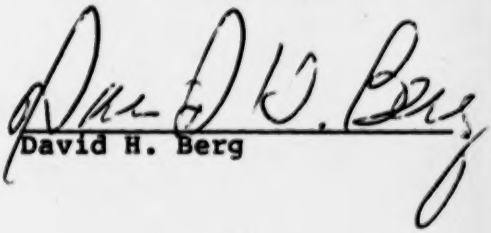
BY: 

David H. Berg
Philip D. Zelikow
3702 Travis
Houston, Texas 77002
(713) 529-5622

January 10, 1983

CERTIFICATE OF SERVICE

I hereby certify that on this _____ day of January, 1983, three copies of the Petition for Writ of Certiorari were mailed, postage prepaid, to Lonnie F. Zwiener, Assistant Attorney General, P. O. Box 12548, Capitol Station, Austin, Texas 78711.



David H. Berg